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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DALE FOLTZ, PETITIONER

vs.

JONATHON HOPSON, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

WHETHER FEDERAL HABEAS CORPUS REVIEW OF CLAIMS OF INSUFFICIENT EVIDENCE TO SUPPORT A CRIMINAL CONVICTION IMPROPERLY CAUSES UNWARRANTED INTERFERENCE WITH STATE COURT PROCEEDINGS SO THAT THIS COURT SHOULD RECONSIDER JACKSON V VIRGINIA?

II

IF FEDERAL HABEAS CORPUS REVIEW OF CLAIMS OF INSUFFICIENT EVIDENCE IN CRIMINAL CASES IS PROPER, SHOULD THE COURT'S RULING IN JACKSON V VIRGINIA THAT THE STANDARD OF REVIEW IS WHETHER A REASONABLE PERSON COULD FIND GUILT BEYOND A REASONABLE DOUBT RATHER THAN WHETHER THERE WAS ANY EVIDENCE ON EACH ELEMENT BE REEXAMINED?

III

IF THIS COURT DETERMINES THAT JACKSON V VIRGINIA SETS FORTH THE PROPER STANDARD OF REVIEW FOR SUFFICIENCY OF EVIDENCE CHALLENGES IN FEDERAL HABEAS CORPUS, DID THE CIRCUIT COURT OF APPEALS ERR IN FINDING THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT RESPONDENT'S CONVICTION FOR SECOND-DEGREE MURDER?

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DALE E. FOLTZ, PETITIONER

vs.

JONATHON HOPSON, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOW COME the People of the State of Michigan, by and through JOHN D. O'HAIR, Prosecuting Attorney, County of Wayne, TIMOTHY A. BAUGHMAN, Chief of the Criminal Division, Research, Training and Appeals, and CAROLYN SCHMIDT, Assistant Prosecuting Attorney, Appeals, and pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cause on May 20, 1987.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is appended as Appendix A. The order of the Michigan Supreme Court denying leave to appeal is appended as Appendix B. The memorandum opinion and order denying respondent's application for writ of habeas corpus issued by the United States District Court for the Eastern District of Michigan, Southern Division is appended as Appendix C. The opinion of the United States Court of Appeals for the Sixth Circuit granting respondent's petition for a writ of habeas corpus is appended as Appendix D.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on May 20, 1987. A Motion for Stay of Mandate was filed by petitioner on May 29, 1987. The

jurisdiction of this Court is invoked under 28 USC Sec. 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Elaine Faye Peterson, the only eyewitness to the shooting, testified that on the night of the shooting she

went to the San-Zu-Zee Bar located at Hart and Jefferson in the City of Detroit to find Gerald Marks and buy marijuana from him. She saw the victim, Alfred Hagwood, respondent, and Keith and Kenneth Weaver in the bar where they were all arguing about a radio. Respondent and the Weavers left the bar and the victim approached the witness and told her that those punks, referring to respondent and the Weavers, had taken his radio. The victim left the bar a few minutes before the witness and when she left she saw respondent, the Weavers and the victim outside. The three men told the victim to stay there until they came back, and that where he was going he wouldn't need a radio. All three of the men also told the victim that if he stayed there he would never see daylight. Ms. Peterson then went to the home of Gerald Marks several blocks from the bar and across Jefferson Avenue. She knocked

on the door and there was no answer so she began to walk back to her house on Lycaste a block from Hillger where Gerald Marks lived and across Jefferson Avenue. On the way back to her house she heard respondent and the Weavers arguing with the victim by the bank at Jefferson and Hillger. At this point she saw Fred Thompson drive up in his car, come out with a gun and join the argument. She then heard shots fired, and as she ran home she looked back to see Fred Thompson with the gun and the victim running up Hillger.

During the testimony of Ms. Peterson it was brought out that she was reluctant to testify as she had been threatened by a relative of the respondent and by a friend of Fred Thompson, a co-participant in the crime.

George Taylor, an off-duty Detroit Police Officer, was at his home on Hillger on the night of the incident when

he heard three shotgun blasts. Within a minute after the final shot, Mr. Taylor observed respondent and one of the Weaver twins come out of the alley and head for respondent's home. When they reached the house, the front door was opened and something was passed into the house. Respondent and the Weaver twin then turned around and headed back toward the alley. The police were unable to find any shotgun shells in the area of the shooting.

Arbura Brown, a barmaid at the San-Zu-Zee Bar on the night of the shooting, testified that she saw respondent in the bar on that night. Respondent left the bar at one point and when he reentered the bar he had a smile on his face and was laughing and asked the witness if she had heard shots outside.

Respondent was convicted of second-degree murder and possession of a firearm

in the commission of a felony, and on June 24, 1981, he was sentenced to life in prison for the murder conviction, and received a two year term on the firearm charge.

Respondent's co-defendants, Keith and Kenneth Weaver and Fred Thompson, were convicted of first-degree murder in a separate trial held in December of 1980.

In a per curiam opinion dated January 27, 1983, respondent's conviction for second-degree murder was affirmed and his firearm conviction was reversed as the prosecution had conceded that his actions were insufficient to support his conviction on that charge.

Pursuant to a letter request for review of his case under Administrative Order 1977-4, 400 Mich lxvii (1977), for a determination of whether leave to appeal or other relief was to be granted by the Michigan Supreme Court, that Court ordered that counsel should be appointed

for respondent. Such counsel was ordered to prepare and file an application for leave to appeal, and any portion of the record needed by counsel was to be furnished once it was determined that respondent was indigent.

Defense counsel filed a delayed application for leave to appeal in the Michigan Supreme Court in December of 1983. By order dated November 30, 1984, respondent's delayed application for leave to appeal was denied as the Court was not persuaded that the questions presented should be reviewed. Justice Levin would have granted leave to appeal on the issue of whether there was sufficient evidence that respondent participated in a concert of action to murder.

In January of 1985, respondent filed a Petition for Writ of Habeas Corpus under 28 U.S.C. 2254 asserting that there was insufficient evidence presented at trial

to support his conviction for second-degree murder. Respondent's Application for Writ of Habeas Corpus was denied on January 10, 1986.

On February 10, 1986 respondent filed a pro per Notice of Appeal from the United States District Court ruling denying his Application for Writ of Habeas Corpus. On that date, respondent also filed a Petition for Certificate of Probable Cause which was denied on February 14, 1986.

Respondent then appealed to the Sixth Circuit Court of Appeals claiming that the Federal District Court erred in denying his Application for Writ of Habeas Corpus. The Sixth Circuit Court of Appeals granted respondent's petition in a per curiam opinion of May 20, 1987.

REASONS FOR GRANTING THE WRIT

Petitioner submits that federal habeas corpus review of claims of insufficient

evidence to support a conviction in criminal cases is redundant, interferes with state court proceedings, and is an unwarranted burden on the federal courts.

Justice Stevens, in his concurrence in the judgment in Jackson v Virginia, 443 US 307, 336-337, 61 L Ed 2d 560, 99 S Ct 2781 (1979),cogently discussed his reasons for believing that the Court's ruling in that case would be seriously harmful both to the state and federal judiciaries:

> The Court indicates that the new standard to be applied by federal judges in habeas corpus proceedings may be substantially the same as the standard most state reviewing courts are already applying. Ante, at 322, 61 L Ed 2d, at 576. The federal district courts are therefore being directed simply to duplicate the reviewing function that is now being performed

adequately by state appellate courts. In my view, this task may well be inconsistent with the prohibition -- added by Congress to the federal habeas statute in order to forestall undue interference with state proceedings, see Wainwright v Sykes, 433 US 72, 80, 53 L Ed 2d 594, 97 S Ct 2497 -- against overturning "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction.: 28 USC Sec. 2254(d) [28 USCS Sec. 2254(d)]. See LaVallee v Delle Rose, 410 US 690, 35 L Ed 2d 637, 93 S Ct 1203. In any case, to assign a single federal district judge the responsibility of directly reviewing, and inevitably supervising, the most routine work of the highest courts of a State can only undermine the morale and

> esteem of the state judiciary - particularly when the stated purpose of the additional layer of review is to determine whether the State's factfinder is "rational." Such consequences are intangible but nonetheless significant.
>
> The potential effect on federal judges is even more serious. Their burdens are already so heavy that they are delegating to staff assistants more and more work that we once expected judges to perform.

Also, the opinion of the Court in Nichols v Gagnon, 710 F 2d 1267, 1271-1272 (CA 7, 1983), is instructive in regard to the adequacy of state court proceedings in avoiding conviction of the innocent:

> The concern underlying Jackson v Virginia -- assuring that the innocent are not convicted -- cannot be faulted. But it is

unclear to us why the state courts cannot be fully trusted to prevent such an outrage. To be concerned that state courts might not give so much weight to federal constitutional rights as federal courts do (though there is considerable doubt that this is true today, whatever the situation may once have been) is one thing; to think that state judges have any less concern than federal judges with avoiding the conviction of the innocent is another. The innocent are not a despised and vulnerable minority who need the protection of the federal courts.

* * *

...[S]tate courts have the same incentives as federal courts not to allow innocent people to be convicted.

For the above stated reasons, the

review of sufficiency of evidence claims in federal habeas corpus cases is unnecessary and harmful to both state and federal courts.

Further, the Court's "holding" in Jackson v Virginia, supra, that in a habeas corpus challenge to a state criminal conviction the applicant is entitled to relief "if it is found that upon the evidence adduced at the trial no rational trier of fact could have found proof beyond a reasonable doubt" is dicta, and if it is not so viewed, petitioner submits Jackson v Virginia should be reexamined and overruled.

First, petitioner would point out that since this Court held in Jackson v Virginia, supra, that the evidence presented in that case satisfied any standard of review, the decision as to whether the reasonable doubt standard is constitutionally required was not necessary to the decision in that case.

(majority opinion, 443 US 326, concurrence in judgment, 443 US 328). The "holding" on the reasonable doubt standard is therefore obiter dictum, and Jackson v Virginia may be repudiated by this Court without doing violence to the doctrine of stare decisis. See Bardes v Hawarden Bank, 178 US 524 (1899); Darr v Burford, 339 US 200 (1949). Petitioner further submits that the "holding" in Jackson v Virginia on the reasonable doubt test is erroneous, and necessarily causes the reviewing court to invade the province of the jury.

For a number of years the federal system was divided between two directed verdict tests. One, known as the "Second Circuit Rule" was first enunciated by Judge Learned Hand in United States v Feinberg, 140 F2d 592 (CA 2, 1977), and held that the standard for jury submission in criminal cases is identical to that in civil cases (establishment of

a prima facie case). The other, known as the "Curley Rule" was expressed by Judge Prettyman in Curley v United States, 160 F2d 229, 232-233 (CA DC, 1947) thusly:

> The true rule, therefore, is that the trial judge in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must

> be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

In United States v Taylor, 464 F2d 240 (CA 2, 1972), the Second Circuit repudiated its former rule and adopted the "Curley Rule", as had most circuits and now this Court. 2 Wright, Federal Practice and Procedure, Section 467, 255-257 (1969). The rationale behind the "Curley Rule" is perhaps most concisely stated in Taylor: more "facts in evidence" are required for the judge to allow men and women of ordinary reason and fairness "to affirm the question the proponent is 'bound to maintain' when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in criminal cases, beyond a reasonable

doubt." Taylor, supra at 242.

This Court stated the difficulty as follows:

> Any evidence that is relevant - that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed Rul Evid 401 - could be deemed a "mere modicum." But it could not be seriously argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt. The Thompson doctrine (any evidence) simply fails to supply a workable or even a predictable standard for determining whether the due process command of Winship has been honored. 443 US 320.

Petitioner contends that the "reasonable doubt" standard, despite

disclaimers to the contrary, necessarily involves the reviewing judge in weighing the evidence, drawing inferences, and assessing credibility; in short, it requires the judge to invade the province of the jury. Further, the reasonable doubt test is less workable and predictable than the any evidence test.

In Moore's Federal Practice, Vol. 8A, Chapter 29, it is noted that it is "by no means clear" that there is some "substantive difference" between the Curley Rule and the former Second Circuit Rule, and that "it is doubtful whether the use of one as opposed to the other would materially affect the decision in a given case." Nonetheless, the Curley or reasonable doubt test makes possible a directed verdict of acquittal in cases where the prosecution has presented some evidence, either direct or circumstantial, on each material element of the offense charged. Thus, a reviewing court

which sets aside a verdict of guilt where there is evidence presented on every element of the offense does so only by usurping the jury function.

It must be remembered that the reviewing judge or court is not to ask "do the facts presented prove guilt beyond a reasonable doubt?" but rather "can the facts presented prove guilt beyond a reasonable doubt?" If they can, the question of whether or not in the particular case they do is for the jury on the trial of the case. The judge is not to act as a thirteenth juror. As noted, he cannot weigh evidence, draw inferences unfavorable to the People's case where fair inferences can be drawn, or assess credibility.

Fatal to the reasonable doubt rule as explained and defended in United States v Taylor, supra, and by this Court in Jackson v Virginia, supra, is the assumption that "more facts in evidence"

are required to allow the case to go to the jury where the standard of persuasion is higher; that is, in a criminal case, where the standard is proof beyond a reasonable doubt, than in a civil case, where the standard is proof by a preponderance of the evidence. But can it be said that evidence which convinces a jury by a preponderance of the evidence might not also persuade the jury beyond a reasonable doubt if the jurors were so instructed? The following hypothetical, which goes to the heart of the matter, was posed by Judge Frank, an outspoken critic of the Second Circuit Rule, concurring in United States v Masiello, 235 F2d 279, 285 (CA 2, 1956):

> (a) There is testimony justifying some testimonial inferences. (b) A particular derivative inference (i.e., 'circumstantial evidence'), drawn from these testimonial infer-

ences, is essential to a verdict for one party. (c) That derivative inference is rational, i.e., on the basis of that inference, the occurrence of an essential fact may be inferred rationally, although no one has testified to that fact. (d) The support in the testimonial inferences ('direct evidence') for the derivative inferences (i.e. for that 'circumstantial evidence') is such that the occurrence of that inferred fact is more probable than its non-occurrence, but is not much more probable. In a civil jury case of that sort, the judge should not direct a verdict - and he may not properly, after verdict, enter a judgment n.o.v. - at variance with such a derivative inference (i.e., with the 'circumstantial evidence').

Does the same rule apply in a

> criminal case? ... The Second Circuit now says yes. Many other courts say no. I think the latter answer correct. (emphasis in the original).

The difficulty with Judge Frank's view and this Court's view that a "mere modicum" of relevant evidence on each element cannot support a guilty verdict is that whether "The support in the testimonial inferences ... for that derivative inference ... is such that the occurrence of that inferred fact is more probable than its non-occurrence but not much more probable," or whether in the particular case the inference follows beyond a reasonable doubt is a jury question. If the inference is rational the case should go to the jurors under proper instructions to determine whether they are persuaded beyond a reasonable doubt. For the trial judge or an appellate court to make the determination

of the force which a rational inference carries in a particular case is to invade the province of the jury, for the jury is to draw all fair inferences and assign the weight to them it believes appropriate. That is their function.

Justice Stevens in his concurrence in the judgment in Jackson v Virginia, 443 US at 334, noted that if the Court's syllogism that since Winship requires the factfinder to apply a reasonable-doubt standard it then requires a reviewing judge to apply a like standard, is taken to its ultimate conclusion it would require a reviewing court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Of course, the Court expressly stated that this was not the standard to be applied by the reviewing court, 443 US at 318-319, but that is precisely what the Sixth Circuit Court of Appeals did in the present case. It is

apparent from the facts as set forth in that Court's opinion that fair inferences were ignored and the credibility of witnesses was assessed. Thus, while having only the cold record before it, that Court substituted its judgment for that of the trier of fact in concluding that the Michigan courts of appeals and the United States district court erred in finding sufficient evidence to support respondent's conviction for second-degree murder.

Also worthy of note is Chief Justice Burger's dissent from the denial of certiorari in Fuller v Anderson, 455 US 1028, 72 L Ed 2d 150, 102 S Ct 1734 (1982), in which he stated:

> With all respect, I suggest that the District Court and the Court of Appeals' majority forgot that it is the function of the jury to determine who is telling the truth. Judges betray their function when

> they arrogate themselves over the legal factfinder. Either we accept the jury system with the risk of human fallibility or we ought to change the structure of the system and redefine the standard of review under the habeas corpus statute. The District Court and the Court of Appeals did not view the evidence in the light most favorable to the prosecution, as the law and their oaths require. If they had, they could not have rationally concluded that the jury could not reasonably reach the result it reached.

In the present case it is clear that the Sixth Circuit Court of Appeals did not view the evidence in a light most favorable to the prosecution. For instance, that Court notes that Ms. Peterson testified that she heard someone tell the victim that "he wouldn't need a radio where he was going" but was unable

to say if it was respondent or one of his companions. However, this is not so. At several points in her testimony Ms. Peterson stated that respondent himself made this threat. That Court also did not mention the other threat made to the victim by respondent and the Weaver twins that the victim should stay there until they came back, and if he did he would never see daylight.

In light of the above facts, the Court of Appeals clearly erred in finding that there was insufficient evidence to support respondent's conviction. Further, Jackson v Virginia, supra, requires trial judges as well as appellate courts to usurp the jury function, and thus it should be reconsidered by this Court.

CONCLUSION

For the reasons stated above Petitioner submits that plenary review should be granted.

Respectfully submitted,

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Dated: June 30, 1987

CS/dh

APPENDICES

STATE OF MICHIGAN
COURT OF APPEALS

January 27, 1983

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v.

Docket #60184

JOHNATHON HOPSON,

Defendant-Appellant.

BEFORE: S.J. Bronson, P.J., and V.J. Brennan and J.H. Gillis, JJ.

PER CURIAM

Defendant Johnathon Hopson appeals as of right convictions for second degree murder, MCL 750.317; MSA 28.549, and felony firearm, MCL 750.227b; MSA 28.424(2), after a jury trial. On June 24, 1981, defendant was sentenced to life in prison for second degree murder, and he received a two year sentence for felony firearm.

On appeal, defendant contends that his conviction for second degree murder should be reversed because there was insufficient evidence that defendant

aided or abetted in the murder of Alfred Hagwood. The standard of review on appeal for sufficiency of the evidence is set forth in People v Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885 (1980), which provides:

> "Due process requires that the prosecutor introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt before a defendant can be convicted of a criminal offense."

MCL 750.317; MSA 28.549 provides:

> "All other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any terms of years, in the discretion of the court trying the same."

The elements of this offense were

discussed in People v Stinson, 58 Mich App 243; 227 NW2d 303 (1975), lv den, 394 Mich 761 (1975), where the Court stated:

"According to 3 Gillespie, Michigan Criminal Law and Procedure, Sec 1639, p 1793:

"'To constitute murder in the second degree there must be an unlawful killing and a purpose to kill, formed suddenly, preceding and accompanying the act, without that deliberation and premeditation which distinguishes murder in the first degree, but not such sudden provocation and stirring of the passions which precludes the exercise of reason, as would, in a legal sense, exclude the idea of malice aforethought, and thereby reduce the homicide to manslaughter.'

"Murder 'is an unlawful, malicious killing', and malice

aforethought is an essential element of second-degree murder. People v Carter, 387 Mich 397, 416-418; 197 NW2d 57 (1972). According to People v Morrin, 31 Mich App 301, 310-311; 187 NW2d 434 (1971) lv den, 385 Mich 775 (1971):

"'Malice aforethought is the intention to kill, actual or implied, under circumstances which do not constitute excuse or justification or mitigate the degree of the offense to manslaughter. The intent to kill may be implied where the actor actually intends to inflict great bodily harm or the natural tendency of his behavior is to cause death or great bodily harm.' (Footnotes omitted.)

"Homicides which are 'unplanned or impulsive' or committed 'in the sudden heat of passion', and which are intentional and committed with

malice aforethought are murder in the second degree. Austin v United States, 127 US App DC 180; 382 F2d 129, 137 (1967). See also People v Vail, 49 Mich App 578, 591; 212 NW2d 268 (1973), lv granted, 391 Mich 789 (1974).

"People v Hansen, 368 Mich 344, 350-351; 118 NW2d 422 (1962), noted that malice required either an intent to cause the specific harm that resulted;

"'or some harm of the same general nature, or an act done in wanton or wilful disregard of the plain and strong likelihood that some such harm will result.'" 58 Mich App 246-248. Also see, People v Jones, 115 Mich App 543, 553-555 (1982).

The pertinent law on aiding and abetting was set forth in People v Karst, ___Mich App___ (No. 57110,

rel'd July 13, 1982, Slip Op, p 3) where the Court stated:

"A person may be prosecuted for aiding and abetting without regard to the conviction or acquittal of the principal. People v Mann, 395 Mich 472, 478; 236 NW2d 509 (1975). All that need be proved is that the crime was committed by someone and that the defendant either committed or aided and abetted the commission of that crime. Id. To be convicted as an aider and abettor, a defendant must either himself possess the required intent to commit the substantive offense or participate while knowing that his co-participant possessed the requisite intent. People v Triplett, 105 Mich App 182; 306 NW2d 442 (1981). Either a defendant's intent or his knowledge that his co-participant had the necessary intent may be

inferred from circumstantial evidence. Id. However, a defendant's mere presence at the scene of a crime is not enough, in and of itself, to make him an aider and abettor:

"'Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiescence or consent.' People v Burrel, 253 Mich 321, 323; 235 NW2d 170 (1931), quoting 1 Cyc. Crim Law (Brill), Sec. 233."

Here, Alfred Hagwood was killed by a shotgun blast. Elaine Peterson saw the defendant and the Weaver twins arguing with Hagwood in the San-Zu-Zee Bar. Peterson heard defendant tell Hagwood

"that where he was going he didn't need a radio". The men left the bar. When Peterson left the bar, defendant, the Weavers, and Hagwood were outside of the bar arguing. The men told Hagwood "that if he stayed there he wouldn't ever see daylight." Peterson walked over to Gerald Marks' residence on Hillger. After knocking on the door and receiving no response, Peterson started walking back towards her home. She observed defendant, the Weaver twins, and Hagwood standing near the alley by Hillger and East Jefferson. The men were arguing about a radio. Fred Thompson pulled up in his car; he exited his car with a gun, and joined the other man. Peterson heard two shots, and then she ran home.

George Taylor heard three shotgun blasts, then he observed a black male trotting north on Hillger. The police were unable to find any shotgun shells in the area of the shooting. Within a

minute after the final shot, George Taylor observed defendant and a Weaver twin come out of the alley and head for defendant's home. When defendant and the Weaver twin reached the porch of defendant's house, the front door was opened and something was passed into defendant's house. Defendant and the twin then turned around and headed back toward the alley.

The issue in the present case is closely drawn. However, based upon the evidence that defendant threatened Hagwood prior to the shooting, defendant was at the scene of the shooting at the time it occurred; and defendant and a Weaver twin handed something into defendant's house after the shooting, we conclude that the jury could have inferred that defendant aided and abetted in the murder of Alfred Hagwood. Therefore, we find that the prosecution presented sufficient evidence which could

justify a trier of fact in reasonably concluding that defendant was guilty beyond a reasonable doubt.

As to defendant's conviction for felony firearm, the prosecution concedes that under the authority of People v Johnson, 411 Mich 50, 303 NW2d 442 (1981), there was insufficient evidence to support defendant's felony firearm conviction. The trial record does not contain evidence that defendant procured, counseled, aided or abetted and assisted in obtaining the proscribed possession of a firearm, or in retaining such possession otherwise obtained. Johnson, supra, 54. Consequently, defendant's felony firearm conviction is reversed.

Defendant's final claim is that the impeachment of a witness by the prosecution by use of a prior inconsistent statement was reversible error.

MRE 613 provides:

"(a) Examining witness concerning

prior statement. In examining a witness concerning a prior statement made by the witness, if written the statement must be shown to the witness and if oral, its substance and the time, place and person to whom the statement was made must be disclosed to the witness, and on request must be shown or disclosed to opposing counsel.

"(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to

admissions of a party-opponent as defined in Rule 801(d)(2)."

MRE 613(b) allows extrinsic evidence of a prior inconsistent statement by a witness if that witness is afforded an opportunity to explain or deny the statement. However, the admissibility of extrinsic evidence of a prior inconsistent statement is limited by the collateral matter rule announced in People v Williams, 159 Mich 518, 521; 124 NW 555 (1910). See also, People v Culver, 280 Mich 223; 273 NW 455 (1937); People v Spalla, 83 Mich App 661, 671; 269 NW2d 259 (1978) (dissent by Judge Kelly adopted by the Supreme Court), rev'd, 408 Mich 876 (1980); People v Carner, ___Mich App___ (No. 48553, rel'd July 12, 1982, Sl Op, p 6).

Here, the prosecutor established a proper foundation for questioning the witness, Ernie McDonald, about his prior statement. The prosecutor elicited the

fact that McDonald gave the statement to Officer Dunn on October 11, 1979. McDonald was shown the contents of his prior statement before he was questioned. McDonald repudiated the contents of his prior statement and offered an explanation for the statement. Defendant's attorney had an opportunity to question McDonald about his statement. Therefore, the prosecutor laid a proper foundation for Dunn's testimony concerning the content of McDonald's prior statement.

The only question here is whether the collateral matter rule should have precluded Dunn's testimony. In Bixby v Gallagher, 43 Mich App 328, 339; 204 NW2d 295 (1972), this Court adopted an Indiana Supreme Court test as to whether or not something is "collateral". If the cross-examining party would be entitled to go into the matter in his case in chief, the matter is not collateral. People v Carner, supra, 7. In this case,

since the prosecutor was attempting to impeach his own witness, it must be determined whether the prosecutor could have gone into the matter in his case in chief. Dunn recanted an alleged statement Dennis Marks made to Ernie McDonald. The alleged statement made by Dennis Marks would have been admissible hearsay under the present sense impression exception to the hearsay rule. MRE 803(1). Marks heard the shooting and saw defendant and a Weaver twin leaving the alley. Immediately thereafter, Marks allegedly disclosed what he had seen and heard to Ernie McDonald. Since the statement allegedly made by Dennis Marks would have been admissible hearsay, the prosecutor could have gone into the matter in his case in chief. Therefore, the matter was not collateral. In fact, this was a matter that the prosecutor questioned Dennis Marks about during his direct examination. We, therefore,

conclude that McDonald's credibility was not impeached by extrinsic evidence of a collateral matter. The impeachment of McDonald's credibility by his prior inconsistent statement was proper. It should be noted that the trial judge instructed the jury that inconsistent statements could only be used for the purpose of impeachment.

Defendant's conviction for second degree murder is affirmed and his felony firearm conviction is reversed.

/s/ S. Jerome Bronson

/s/ Vincent J. Brennan

/s/ John H. Gillis

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 30th day of November in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable

71063
(29)

G.MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNATHON HOPSON,

Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

Levin, J., would grant leave to appeal to consider whether there was sufficient evidence that Johnathon Hopson participated in a concert of action to murder.

The shooting followed two discussions concerning a radio that the deceased contended had been stolen by Hopson and two other persons. One discussion took place at a bar and the other at the scene of the shooting shortly before the shooting. It is unclear whether Hopson participated in the second discussion shortly before the shooting. Fred Thompson, who shot the deceased, joined the group at the bar where the first discussion occurred. The scene of the shooting is approximately two to three blocks from the bar. Hopson lived within a block of the scene of the shooting. The first discussion occurred at approximately 9:15 to 9:30 p.m., and the second at approximately 12:15 a.m. on the same night.

A witness testified that she heard Hopson and the other two persons tell the deceased at the bar that where he was

going he would not need a radio and that, if he stayed where he was, he would never see daylight. The record is unclear whether the witness was saying that each of the three persons (Hopson and the two others) made the statements, which might be characterized as a threat, a warning, or a prediction.

Fred Thompson arrived at the scene of the shooting in an automobile. He was not accompanied by Hopson or the other two persons. They were already at the scene. Thompson took a gun from the trunk of his automobile and fired the fatal shots. Hopson was seen leaving the scene of the shooting and proceeding to his house a short distance away where he appeared to hand some objects to a person in the house. The decedent was shot with a pump-action shotgun. Because of the rapid succession of shots heard by witnesses, it is inferred that the shotgun automatically ejected the shell

casings. No casings were found at the scene. The prosecutor contends that the jury could infer that the objects that Hopson handed to persons in the house were the missing shotgun shell casings.

I would grant leave to appeal because there appears to be a substantial question whether there was sufficient evidence to justify the trier of fact in concluding beyond a reasonable doubt[1] that Hopson participated in the shooting and not merely in the discussions preceding the shooting.

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[1] "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v Virginia, 443 US 307, 319; 99 S Ct 2781; 61 L Ed2d 560 (1979). See also, People v Hampton, 407 Mich 354; 285 NW2d 284 (1979).

STATE OF MICHIGAN -- ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a

true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 30th day of November in the year of our Lord one thousand nine hundred and eighty-four.

(seal)

/s/ Corbin R. Davis, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JONATHON HOPSON,
Plaintiff,

v. CA No. 85-CV-0286-DT
Hon. George LaPlata

DALE FOLTZ,
Defendant. /

MEMORANDUM OPINION AND ORDER DENYING PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 10th day of January, 1986.

PRESENT: THE HONORABLE GEORGE LAPLATA
United States District Judge

I. Introduction

Charged with first-degree murder[1] and possession of a firearm in the commission of a felony,[2] Petitioner, Jonathon Hopson, was convicted by a jury in Recorder's Court of second-degree murder[3] and the firearm charge on June

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[1]/M.C.L.A 750.316, M.S.A. 28.548

[2]/M.C.L.A. 750.227(b), M.S.A. 28.424(2)

[3]/M.C.L.A. 750.317, M.S.A. 28.549

9, 1981.[4] On January 27, 1983, the Michigan Court of Appeals, in an unpublished opinion, affirmed the murder conviction but vacated the firearm conviction.[5] On November 30, 1984, the Michigan Supreme Court denied Petitioner's Application for leave to appeal.[6]

II. Application for Writ of Habeas Corpus

On January 22, 1985, Petitioner, incarcerated at the State Prison of Southern Michigan at Jackson, filed a Petition for a Writ of Habeas Corpus, 28 U.S.C. Sec. 2254. Therein, he raised

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4/ Petitioner was sentenced to life in prison on the murder conviction.

5/ Docket No. 60184

6/ Docket No. 71063. Justice Levin voted to grant leave to appeal to consider whether sufficient evidence was adduced to establish that Petitioner participated in the crime.

only one issue, claiming that the prosecuting attorney failed to adduce sufficient evidence to permit a jury to find that he was guilty beyond a reasonable doubt of second-degree murder.

III. Facts

During the early morning of October 10, 1980, Alfred Hagwood was fatally shot in an alley off Hillger Street between E. Jefferson and Kerchevel in Detroit. The theory of the prosecution was that Petitioner, Kenneth Weaver, and Keith Weaver (neither of whom was tried along with Petitioner) aided and abetted Fred Thompson in the first-degree slaying of Hagwood.

The one eyewitness to the homicide, Elaine Faye Peterson, testified that she visited the San-Zu-Zee Bar, located at Hart and Jefferson in the City of Detroit, between 9:30 p.m. and 10:00 p.m. on October 9, 1985, where she observed

the victim "arguing" with Petitioner, Kenneth Weaver, and Keith Weaver over a radio. When Petitioner, Kenneth Weaver, and Keith Weaver left the bar, the victim approached Peterson and informed her that the three men with whom he had been arguing had taken his radio. Soon thereafter, Peterson left the bar, where she again observed the victim, Petitioner, and the Weaver brothers. Peterson heard Petitioner say to the victim that "where he was going he didn't need a radio." She also stated that the Weavers and Petitioner informed the victim that he should remain at the bar until they returned, but, contradictorily, that if he remained there, "he wouldn't ever see daylight."

Later in the evening, Peterson visited the home of Gerald Marks, who lived several blocks from the bar. When he didn't answer, she began to walk toward her house; during the route, she heard

Petitioner, Keith Weaver, and Kenneth Weaver arguing with the victim by a Detroit Bank and Trust branch located at the intersection of Jefferson Avenue and Hillger Street. Soon thereafter, she observed Fred Thompson arrive in an automobile, emerge therefrom with a shotgun, and join the other men. Hearing two gunshots, Peterson ran toward her house.[7]

An off duty Sergeant of the Detroit Police Department, George Taylor, who lived on Hillger Street, heard three gunshots at approximately midnight on October 9, 1979. One minute after he heard the third gunshot, Sergeant Taylor noticed Petitioner and either Keith or

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7/ Ms. Peterson was not an exemplary witness; she had difficulty recalling part of the incident and was a substance abuser. As the assistant prosecuting attorney noted in his opening statement, the police do not have control over individuals who witness crimes.

Kenneth Weaver emerge from an alley. Knowledgeable of Taylor's position with the Detroit Police Department, Petitioner, as he walked toward his house, also located on Hillger Street, looked in the direction of the residence of Sergeant Taylor. Petitioner and one of the Weaver brothers entered Petitioner's house; when they exited, Sergeant Taylor asked them whether they heard or saw anything, to which both men replied that they heard gunshots but did not see anything related to the gunshots.

After Hagwood was shot, Petitioner and one of the Weaver brothers returned to the San-Zu-Zee bar. A barmaid, Arbura Brown, testified that Petitioner, while laughing and smiling, asked her whether she heard gunshots outside of the bar. On cross-examination, Brown stated that it was not unusual for Petitioner to smile and laugh while he was at the bar.

IV. Applicable Law

Under Jackson v. Virginia,[8] a challenge to a state court conviction on the ground that the evidence was insufficient to establish guilt beyond a reasonable doubt raises a federal constitutional claim. In Jackson, the Supreme Court enunciated the following standard with respect to an insufficiency of the evidence claim:

> We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. Sec 2254--if the settled procedural prerequisites for such a claim have otherwise been satisfied--the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no

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[8]/ 443 U.S. 307, 322, 99 S.Ct. 2781, 1 L.Ed.2d 560 (1979)

rational trier of fact could have found proof of guilt beyond a reasonable doubt.[9]

Defendant was convicted of aiding and abetting in the second-degree murder of Alfred Hagwood. In Michigan, the elements of second-degree murder are (1) a homicide occurred; (2) the accused killed with malice aforethought but without premeditation and deliberation; and (3) the provocation leading to the act did not deprive the actor of the exercise of reason to the extent that the murder would be reduced to manslaughter.[10]

9/ Jackson at 324

10/ People v. Stanek, 61 Mich. App. 571, 233 NW2d 89, 91 (1975); 3 Gillespie, Michigan Criminal Law and Procedure (2d Ed.), Sec. 1639, pp. 1973-1974.

In 1855, the Michigan Legislature enacted an aiding and abetting statute (currently M.C.L.A. 767.39, M.S.A. 28.979), which abolished the common law distinction between accessories before the fact and principals. Under the statute, one who counsels, aids, or abets in the commission of an offense may be prosecuted and convicted as though he had directly committed the offense.[11] In People v. Palmer,[12] the Michigan Supreme Court defined the term "aiding and abetting":

> In criminal law the phrase "aiding and abetting" is used to describe all forms of assistance rendered to the perpetrator of a crime. This term comprehends all words or deeds

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11/ People v. Gould, 384 Mich. 71, 179 N.W.2d 617, 620 (1970)

12/ 392 Mich. 370, 220 N.W.2d 393, 396-397 (1974).

> which may support, encourage or incite the commission of a crime. It includes the actual or constructive presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance, if necessary. The amount of advice, aid or encouragement is not material if it had the effect of inducing the commission of the crime. (Citations omitted.)

A careful review of the trial transcript leads this Court to conclude that the prosecution adduced sufficient evidence to justify a reasonable fact finder to conclude, beyond a reasonable doubt, that Petitioner aided and abetted in the second-degree murder of Alfred Hagwood. Viewing the evidence in a light favorable to the prosecution, the Court determines that evidence was presented that (1) Petitioner threatened the victim two hours before the shooting; (2) Peti-

tioner was seen arguing with the victim nearly immediately preceding the fatal force used by Fred Thompson, an acquaintance of Petitioner; (3) Petitioner was with Fred Thompson three to four hours before the shooting; (4) Petitioner exhibited possible furtive actions when he walked by a Detroit Police Sergeant's house minutes after the incident; and (5) after the shooting, Petitioner, in a smiling and laughing manner, asked a barmaid whether she heard gunshots. Although this is not a case where the accused confessed to the crime or was apprehended while holding a "smoking gun," the evidence presented by the prosecution, a mixture of circumstantial and direct evidence, was, in this Court's view, of a compelling and convincing nature so as to withstand easily a motion for a directed verdict or a petition for post-judgment relief premised on an insufficiency of the evidence claim.

V. Conclusion

In view of the foregoing analysis, Petitioner's Application for Writ of Habeas Corpus is DENIED. A judgment to that effect will be entered.

/s/ GEORGE LAPLATA

U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JONATHON HOPSON,
Plaintiff,

v. CA No. 85-CV-0286-DT
Hon. George LaPlata

DALE FOLTZ,
Defendant. /

JUDGMENT

In accordance with the Memorandum Opinion and Order entered on January 10, 1986,

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be DENIED.

Dated at Detroit, Michigan, this 10th day of January, 1986.

ROBERT A. MOSSING
CLERK OF THE COURT

By: /s/ Steven M. Kaplan
DEPUTY CLERK

APPROVED:

/s/ GEORGE LAPLATA
U.S. DISTRICT JUDGE

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

NO. 86-1155
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED May 20, 1987
JOHN P. HEHMAN, CLERK

JOHNATHON HOPSON,

Petitioner-Appellant

v.

DALE FOLTZ,

Respondent-Appellee

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MICHIGAN

Before: MARTIN and MILBURN, Circuit Judges; and BROWN, Senior Circuit Judge.

PER CURIAM. Johnathon Hopson petitions this court for a writ of habeas corpus claiming that the evidence introduced at his trial was insufficient to support a conviction for aiding and abetting second degree murder. For the following reasons, we grant Hopson's petition.

Hopson was convicted in June 1981 of second degree murder and possession of a firearm in the commission of a felony.

He was sentenced to life imprisonment for the murder count and to two years for the felony firearm count. In January 1983, the Michigan Court of Appeals affirmed his conviction for second degree murder but vacated the firearm conviction. The Michigan Supreme Court denied his leave to appeal.

The standard for reviewing a conviction challenged on insufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

The pertinent facts of this case are that in the early morning hours of October 10, 1979, Alfred Hagwood was fatally shot. The prosecution's sole witness who claimed personal knowledge of the shooting was Elaine Peterson.

Peterson testified that just prior to the shooting she saw Hopson and Hagwood standing on a street corner arguing, although she also said she did not actually hear Hopson say anything. She then saw Fred Thompson arrive in a car and take a gun out of his trunk. She heard shots but could give no particulars as to the shooting itself. An off-duty policeman who also heard the shots observed Hopson leave an alley and walk to his house a short distance away. Hopson appeared to hand something to a person inside. The prosecution's theory was that because of the rapid succession of shots heard by witnesses, the shotgun used in the killing automatically ejected shell casings. No casings were found at the scene, therefore one could infer that the objects carried by Hopson were the spent shells.

Peterson also testified that earlier in the evening at a bar she had seen

Hopson, Hagwood, and two others arguing about a radio which apparently Hagwood thought the others had stolen. She overheard someone tell Hagwood that "he wouldn't need a radio where he was going" but was unable to say if it was Hopson or one of his companions.

Second degree murder in Michigan is defined relative to first degree murder.

> FIRST DEGREE MURDER-- All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.

Mich Comp. Laws Ann. Sec. 750.316

> SECOND DEGREE MURDER--All other

> kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

Id., Sec. 750.317.

> The statutory offense of aiding and abetting is defined as:
>
> Every person concerned in the commission of an offense, whether he directly commenced the act constituting the offense or procures, counsels, aids, or abets in its commission, may hereafter be prosecuted, indicted, tried and on conviction, shall be punished as if he had directly committed such offense.

Id. Sec. 767.39. Under Michigan law there is no longer a distinction between accessories before the fact and principals; however, Michigan still

recognizes the common law offense of accessory after the fact. People v. Williams, 117 Mich. App. 505, 513, 324 NW2d 70 (1982). A person cannot be convicted as an aider and abettor on the basis that he was an accessory after the fact. People v. Lucas, 402 Mich. 302, 303, 262 NW2d 662 (1978).

In order to be guilty of aiding and abetting, "the accused must take some conscious action designed to make the criminal venture succeed... ." Fuller v. Anderson, 662 F2d 420, 424 (6th Cir. 1981)(citing People v. Cooper, 326 Mich 514, 40 NW2d 708 (1950) and People v. Gordon, 60 Mich App 412, 231 NW2d 409 (1975)). The defendant's mere presence, even with the knowledge that a crime is being committed or is about to be committed, is not enough to make him an aider and abettor, "nor is mere mental approval sufficient, nor passive

acquiescence or consent." Fuller, 662 F2d at 424 (quoting People v. Burrel, 253 Mich 321, 323, 235 NW2d 170 (1931)).

In reviewing the facts of this case in the light most favorable to the prosecution we are unable to conclude that a rational jury could find beyond a reasonable doubt that Hopson participated as an aider and abettor in the shooting. The testimony of Peterson indicates at most that Hopson was present at the shooting, that he may have argued with the victim during the evening prior to the shooting, that he may have known that someone else intended to harm Hagwood, and that he may have taken the empty shell casings after the shooting.

No proof was given that Hopson acted in pre-concert with Thompson to commit the murder or that he said or did anything to "support, encourage, or incite the commission of the crime."

People v. Palmer, 392 Mich 370, 378, 220 NW2d 393 (1974). His alleged statements at the bar and on the street corner, while showing animus towards the victim, cannot be construed as providing encouragement to the principal. Hopson's actions following the shooting may have made him an accessory after the fact but this cannot form the basis for a conviction as aider and abettor.

We find the evidence presented against Hopson insufficient to establish beyond a reasonable doubt that he took conscious action to aid in the shooting. Accordingly, the petition for writ of habeas corpus is granted.